Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

Misc. No. 1037

JANAF, INCORPORATED,
Petitioner,

vs.

VICTOR J. ORSINGER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Janaf, Incorporated, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on November 30th, 1964.

OPINIONS BELOW

The Court of Appeals did not write an opinion. The said Court of Appeals entered its order dismissing the appeal on November 30, 1964. A copy of said Order is printed in the Appendix hereto, infra, page 8.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on November 30, 1964. The time for filing petition for a writ of certiorari herein was extended to and including April 1, 1965, by an order of this Court entered on March 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in dismissing the appeal of petitioner.

2. Whether the District Court erred in the entry of its order of June 1, 1964, dismissing petitioner's second amended complaint.

3. Whether the District Court properly applied Rule 6 (a) of the Federal Rules of Civil Procedure, in dismissing petitioner's second amended complaint.

4. Whether the District Court erred in denying petitioner the right to be heard in opposition to the Motion for Summary Judgment.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 6(a), as amended January 21, 1963, effective July 1, 1963, provides, inter alia, as follows: "(a) *computation.* In computing any period of time prescribed or allowed by these Rules, by the local Rules of any District Court, by order of Court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last of the period so computed shall be included unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday."

Rule 56(b): *For defending party.* "A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

U. S. Appeals D. C. Rules

Rule 16(b). *Statement of Appellant and Appellee as to Contents of Joint Appendix.*

"Within 10 days after the filing of the record appellant shall serve and file with the Clerk a statement of the parts of the record he proposes to print in the joint-appendix. Within 10 days after the filing of appellant's statement, appellee shall serve and file a statement of the parts of the record not included in appellant's statement which appellee desires to have printed in the Joint-appendix."

Rule 16(g). *Matters inadvertently omitted may be added.*

"If anything material to the appeal is inadvertently omitted from the joint appendix, the Clerk on the written request of any party duly served and filed prior to the expiration of the time for filing the reply brief may allow the joint-appendix to be released to the printer for the purpose of adding such matter thereto."

STATEMENT

Petitioner filed his appeal in the Court of Appeals from a judgment of the District Court which failed to compute the time in accordance with Rule 6(a) of the Federal Rules of Civil Procedure, as amended January 21, 1963, effective July 1, 1963. That thereafter and in accordance with the provisions of Rule 16(b) of the Rules of the Court of Appeals, the petitioner filed its designa-

tion of the portions of the record for inclusion in the joint-appendix, on August 10, 1964. That thereafter, on October 7, 1964, petitioner filed its brief on joint-appendix in the Court of Appeals. That through inadvertance, parts of the record designated by petitioner for inclusion in the said joint-appendix were omitted therefrom. That before petitioner could comply with the provisions of Rule 16(g) of the rules of the Court of Appeals, and, on October 9, 1963, the respondent filed his motion in the Court to dismiss the appeal, because of the said omissions referred to above. The petitioner's opposition to the said motion to dismiss, filed by the respondent, pointed out its readiness to withdraw the said joint-appendix, then, on file, and amend same so as to include those portions of the records inadvertently omitted, or in the alternative, to have the respondent include such portions of the record, in his appendix. (Appendix, Infra, pages 15-19 inclusive).

The Court of Appeals without a consideration of the merits of the appeal, dismissed petitioner's appeal on November 30, 1964. The petitioner was thereby denied its right to be heard on the merits of its appeal and as a result of such denial its petitions this Court for a writ of certiorari to issue to the United States Court of Appeals for the District of Columbia Circuit to correct the judgment of that Court by reinstating the appeal.

REASONS FOR GRANTING THE WRIT

The action of the Court of Appeals in dismissing petitioner's appeal not only denied due process of law to the petitioner, but also ignored its own Rule 16(g). As set forth above Rule 16(g) of the Rules of the Court of Appeals affords the party litigants the opportunity prior to the time for filing the reply brief to: "allow the joint appendix to be released to the printer for the purpose of adding such matter thereto." The failure of the Court of Appeals to apply the provisions of said Rule 16(g) de-

nied the petitioner the equal protection of the law as guaranteed under the fourteenth amendment to the Federal Constitution and consequently violated the due process clause of the fifth amendment to the said constitution. Moreover Rule 16(a) of the Court of Appeals provides in part that: "Appellant shall print in the joint appendix the relevant docket entries in the district court . . . ., the complaint and those portions of the pleadings which are relevant to the issues in the case, then judgment or order appealed from, and the notice of appeal, . . . and such other parts of the Record Material to the Points on Appeal as the appellant desires the Court to read in order to decide the questions presented". Petitioner contends that the only issues presented to the Court of Appeals for determination were: Whether the Trial Court properly computed the time under Rule 6(a), as amended January 1, 1963, effective July 1, 1963, and whether the Trial Court erred in denying petitioner the right to be heard before dismissing the second amended complaint. Petitioner asserts that the joint appendix was adequate for the purpose of determining those issues. Under the order entered April 23, 1964, the Trial Court gave petitioner 30 days from April 23, 1964, to engage counsel and have the appearance of counsel entered in the cause. The 30th day expired on May 23, 1964, which fell on a Saturday, and under said Rule 6(a) the time was automatically extended to Monday, May 25, 1964. (App., Infra, page 10).

The order of the Trial Court dismissing the second amended complaint entered June 1, 1964, provides that the dismissal is premised on the failure of petitioner to cause the appearance of its counsel to be entered within thirty days from April 23, 1964. (App., Infra, page 12). The appearance of counsel for petitioner was entered in the Trial Court on May 25, 1964. The said appearance was entered within the thirty days provided under the

order of April 23, 1964. A cursory computation of said Rule 6(a) discloses the correctness of same.

This Court has held in analogous matters that where the order of Court is relied upon by the party, it is error for the Court of Appeals to dismiss the appeal. Harris Truck Lines, Inc., vs. Cherry Meat Packers, Inc., 1962, 371 U.S. 215. Here the petitioner relied on Rule 16 of the Rules of the Court of Appeals, hence "The Court of Appeals ought not to have disturbed" petitioner's appeal. Reliance on the provision of the order of the Trial Court entered April 23, 1964, to the effect, that petitioner would have thirty days within which to engage counsel and have his appearance entered, is entitled to the protection of this Court. Thompson vs Immigration and Naturalization Service, 1964, 375 U.S. 384. In the latter case this Court referring to the "Harris" case, supra, said that: "In that case petitioner had, within the applicable period for filing his appeal, received from the Trial Court a 30 day extension on the time for filing his appeal on the ground of 'excusable neglect based on a failure of a party to learn of the entry of the judgment'. . . . . petitioner then filed his appeal within the period of the extension but beyond the original period. The Court of Appeals, concluding that there had been no excusable neglect. . . held that the District Court had erred in granting the extension and dismissed the appeal. We reversed the dismissal and remanded the case to the Court of Appeals 'so that petitioner's appeal may be heard on its merits' ". This Court reversed the Court of Appeals in Wolfsohn vs Hankin, et al., 1964, 376 U.S. 203, where the Court of Appeals dismissed the appeal without permitting the petitioner to be heard on the merit.

The petitioner's grievances, therefore, are two-fold. First, the Trial Court's order entered April 23, 1964, gave petitioner 30 days within which to have the appearance of its counsel entered. Petitioner complied with the

foregoing order and had every reason to rely thereon. Secondly, with the above presenting the principal issue for determination by the Court of Appeals, the petitioner had every right to rely on the liberalty of the rules of the Court of Appeals described above.

CONCLUSION

For the foregoing reasons, the petitioner urges the granting of this petition for a writ of certiorari.

Respectfully submitted,

WINFRED R. MUNDLE
Attorney for Petitioner
715 "G" Street, N. W.
Washington, D. C.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1964

No. 18,813

* * * *

ORDER

On consideration of appellee's motion to dismiss and of appellant's motion for leave to file an opposition thereto, the time having expired, it is

ORDERED by the court that appellant's aforesaid motion for leave to file its opposition be granted, and the Clerk is directed to file appellant's lodged opposition, and on consideration whereof, it is

FURTHER ORDERED by the court that appellee's aforesaid motion to dismiss this appeal be granted, and this appeal is dismissed.

Per Curiam.

Dated: Nov 30 1964

* * * *

[Filed August 10th 1964]

DESIGNATION OF PORTIONS OF RECORD FOR INCLUSION IN JOINT-APPENDIX

The above-named appellant designates the following portions of the Record for inclusion in the Joint-Appendix:

1. The Complaint, filed January 12, 1963.
2. The Answer, filed January 29, 1963.

3. Motion For Summary Judgment, filed June 12, 1963.
4. Order For Production, etc., filed September 10, 1963.
5. Order Dismissing Complaint, filed September 18, 1963.
6. Amended Complaint, filed September 23, 1963.
7. Motion to Dismiss Amended Complaint, filed October 4, 1963.
8. Plaintiff's Motion to Dismiss, filed October 11, 1963.
9. Order Granting Motion to Dismiss, filed November 7, 1963.
10. Second Amended Complaint, filed November 16, 1963.
11. Answer to Second Amended Complaint, and Motion to Dismiss, filed November 22, 1963.
12. Motion for Leave to Withdraw, filed January 2, 1964.
13. Order Giving Ten (10) Days, filed April 8, 1964.
14. Memorandum Vacating Order entered April 8, 1964, filed April 9, 1964.
15. Application for Extension of Time, filed April 9, 1964.
16. Order Filed April 23, 1964, directing party to retain counsel within thirty (30) days.
17. Appearance of R. B. Rosenbury for plaintiff, filed May 25, 1964.
18. Order Dismissing Second Amended Complaint, filed Jun 1, 1964.
19. Motion of Plaintiff to Reconsider, filed June 3, 1964.
20. Notice of Appeal, filed June 20, 1964.

s/s Benj. F. Sears
BENJAMIN F. SEARS
Attorney for Appellant

[Certificate of Service]

[Filed April 23, 1964]

ORDER

Plaintiff, by James K. Beazley, having applied to this Court for an extension of time to obtain counsel to represent it in the above entitled action, and plaintiff having represented to the Court that it would require thirty days to communicate its need for funds for the prosecution of this action to its stockholders, and plaintiff having requested that it be allowed a period of thirty days to communicate with its stockholders and solicit and collect the funds needed for the retention of counsel to represent it in the above entitled action, it is this 23rd day of April, 1964,

ORDERED, that plaintiff shall retain counsel and cause such counsel to enter an appearance on its behalf in this action within thirty days from the date hereof, and it is

FURTHER ORDERED, that in the event counsel for the plaintiff shall fail to enter an appearance in this action within thirty days from the date hereof, or shall not be ready to proceed on the argument of defendant's motion for summary judgment now pending, defendant's motion for summary judgment shall be granted and the above entitled action shall be dismissed with prejudice, and it is

FURTHER ORDERED, that this motion be and the same hereby is set for argument on the 25th day of May, 1964.

/s/ Edward M. Curran
Judge

[Certificate of Service]

TRANSCRIPT OF PROCEEDINGS

1 Washington, D. C.
Monday, May 25, 1964

The above-entitled cause came on before the HONORABLE EDWARD M. CURRAN, a U. S. District Judge, at 10:55 a.m., sitting in motions court.

* * * *

2 PROCEEDINGS

THE DEPUTY CLERK: Number 9, Janaf versus Orsinger.

MR. ROSENBERG: My name is Harvey Rosenberg. We just entered our appearance for Janaf, the plaintiff. As Your Honor knows, there were a whole series of cases and we entered our appearance in one about two weeks ago.

Although we don't think that summary judgment can lie, we would like Your Honor to grant us ten days to do some more work. We have only had two weeks in this case and the files are above our heads on the table.

THE COURT: Is there any objection:

MR. DOOLEY: As Your Honor knows, this motion has been pending for six months, and thirty days ago Your Honor brought it to a head by an order directing that the appearance of counsel be filed by the 23rd of May, which was this past Saturday, otherwise the complaint stands dismissed, and in the event that the plaintiff's counsel was not prepared to proceed with argument today, the complaint would stand dismissed.

Now, as I mentioned to Your Honor before, this is the fifth defense of a settlement we made in Judge Hart's chambers three and a half years ago.

3 THE COURT: It will stand dismissed. I just read my order.

MR. ROSENBERG: Your Honor, I am prepared to argue it.

THE COURT: You have not complied with the order. Until you do, you have no standing.

MR. ROSENBERG: I entered my appearance, Your Honor.

THE COURT: You entered it today.

MR. ROSENBERG: Your Honor, I called Mr. Dooley. He knew we were in it on Friday.

THE COURT: I made my ruling. It stands dismissed. I am not going to waste any more time with this case.

MR. ROSENBERG: Your Honor, may I say one more thing?

THE COURT: Yes.

MR. ROSENBERG: The problem with filing the appearance before this is that there is an injunction in 3331 to do anything.

THE COURT: I know. I have been through this before, and so have the other judges in this court.

MR. ROSENBERG: I don't know what I could have done, Your Honor, in violation of that injunction.

THE COURT: I don't know, either.

(Thereupon, the above proceedings were concluded.)

[Filed June 1, 1964]

ORDER

This cause having come on for hearing on the 25th day of May, 1964, on defendant's motion for summary judgment as provided for by order of this Court dated the 23d day of April, 1964, and it appearing that plaintiff was directed by the aforementioned order of the 23d day of April, 1964, to enter an appearance by counsel within thirty days from said date and it appearing that plain-

tiff failed to enter an appearance by counsel within thirty days from the 23d day of April, 1964, it is this 1st day of June, 1964,

ORDERED, that the second amended complaint herein be and the same hereby is dismissed with prejudice.

/s/ Edward M. Curran
Judge

[Certificate of Service]

[Filed June 20, 1964]

NOTICE OF APPEAL

Notice is hereby given that Janaf, Inc., Plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the Order dismissing Plaintiff's second Amended Complaint with prejudice, granted on Defendant's Motion for Summary Judgment, signed by Judge Edward M. Curran, entered in this action on June 1, 1964.

ROBINSON, ROSENBERG, SHERRY & LEVINS

By /s/ Harvey Rosenberg

By /s/ Peter J. Dooley, Jr.
Attorneys for Janaf, Inc.,
Plaintiff

[Certificate of Service]

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* * * *

[Filed September 10, 1964]

COUNTER-DESIGNATION OF PORTIONS OF RECORD FOR INCLUSION IN JOINT-APPENDIX

The above-named appellee counter-designates the following portions of the Record for inclusion in the Joint-Appendix:

1. Opposition to defendant's motion filed December 10, 1963.
2. Order granting motion of plaintiff's counsel for leave to withdraw filed January 15, 1964.
3. Copy of letter, Joseph G. Dooley to Henry Lincoln Johnson, dated February 14, 1964.
4. Letter, Joseph G. Dooley to Judge Sirica, dated February 14, 1964.
5. Letter, Henry Lincoln Johnson to Judge Sirica, dated February 14, 1964.
6. Copy of letter, Henry Lincoln Johnson to Joseph G. Dooley, filed March 4, 1964.
7. Letter, Joseph G. Dooley to Judge Sirica, filed March 11, 1964.
8. Copy of letter, Joseph G. Dooley to Janaf, Incorporated, filed March 11, 1964.
9. Copy of letter, Joseph G. Dooley to Henry Lincoln Johnson, filed March 11, 1964.
10. Order denying motion to reconsider, filed June 17, 1964.
11. Transcript of proceedings before Judge Curran, filed June 30, 1964.

JOSEPH G. DOOLEY
Attorney for Appellee
1604 K Street, N. W.
Washington 6, D. C.

[Certificate of Service]

* * * *

[Filed October 9, 1964]

MOTION TO DISMISS APPEAL

Comes now the Appellee and moves this Court for an Order to dismiss the above-captioned Appeal for failure of the Appellant to print designated material in the Joint-Appendix.

The grounds of this Motion are more particularly stated in the Affidavit of Joseph G. Dooley, hereunto annexed.

/s/ Joseph Dooley
JOSEPH G. DOOLEY
Attorney for Appellee
1604 K Street, N. W.
Washington 6, D. C.

* * * *

[Filed October 27, 1964]

OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL

Comes now the Appellant and moves this Court for an Order denying Appellee's Motion to dismiss Appellant's Motion to dismiss Appellant's Appeal.

The grounds for this Motion are set forth herein below.

The Appellant relies upon Blake v. Trainer 79 U.S. App. D.C. 362, 148 F2d 10 which is quoted for the convenience of the Court.

> "It is not necessary that the parties shall agree on what parts of the record shall be printed in the joint appendix but agreement in that respect is encour-

> aged. Each party may print any parts of the record which he desires the court to read in order to decide the questions presented. Unnecessary portions of the record should not be printed."

The Appellant will arrange with the printer to include any or all of the items that the Appellee has designated in Exhibit "B" to his Motion to Dismiss (see Enclosure "A".)

The Joint Appendix contains those items, which after most careful consideration, the Appellant believes are necessary to decide the narrow issues raised by it.

Your Appellant invites the Court's attention to the fact that the Appellee does not contend that any omission claimed by him in any way prejudices him, but instead merely asserts that the Appellant and Appellee were not in agreement as to what should be printed.

Appellant states that it has no objection to any items that the Appellee desires to include.

WHEREFORE, it is respectfully requested that the Appellee's Motion be denied.

BENJAMIN F. SEARS
Attorney for Appellant
1822 - 11th Street, N. W.
Washington, D. C.

BENJAMIN F. SEARS
Attorney at Law

1822 - 11th Street, N. W.
Washington, D. C.

October 28, 1964

Joseph G. Dooley, Esquire
1604 "K" Street, N. W.
Washington, D. C.

Dear Mr. Dooley:

As has been stated to you, it is believed that in view of the narrow issues Appellant has submitted to the Court, i.e., (a) did the Trial Court misapply the effect of the Amendment to Rule 6(a) of the Federal Rules of Civil Procedure and (b) was Counsel for Janaf, Incorporated, denied the opportunity to be heard in opposition to your client's Motion to Dismiss, that the items included in your Counter Designation of Portions of Record for Inclusion in Joint Appendix have no bearing upon and are entirely unrelated to the aforesaid issues.

It would cause additional unnecessary expense to the Appellant which, as you must know, it can ill afford.

However, should you deem otherwise and insist that it be done, it is suggested that Appellant will withdraw the copies submitted to the Court and instruct the printer to include such of the items shown in your Counter Designation as you may now require.

Since the basic Complaint filed in the lower Court alleges that more than 900 members of the Army, Navy and Air Force have been defrauded of real properties valued at more than $10,000,000.00 without a trial on the merits before any Court anywhere, and are *now nearly without funds*, it is urged that you most care-

fully consider your request for the printing of additional items.

It is also suggested that in view of the above that perhaps you may desire to withdraw your Motion to Dismiss.

Very truly yours,

BENJAMIN F. SEARS

Enclosure "A"

* * * *

AFFIDAVIT IN SUPPORT OF APPELLANT'S MOTION TO DENY APPELLEE'S MOTION TO DISMISS APPEAL

Benjamin F. Sears, being first duly sworn, deposes and says:

I am the attorney for the Appellant in the above-captioned Appeal and make this Affidavit in support of the Motion to Deny Appellee's Motion to Dismiss Appeal.

Your Affiant stated to Mr. Dooley that in view of the narrow issue that Appellant intended to raise that the record should be kept to a minimum.

I stated that I would advise him of any change in this position. Since there was no change, I found it unnecessary to further advise Mr. Dooley.

Your Affiant assures the Court that there has been no deliberate departure from the material designated and adds that he will assist him in any manner in taking whatever corrective action may be deemed proper and necessary.

WHEREFORE, it is respectfully requested that an orbe made denying Appellee's Motion.

.....

BENJAMIN F. SEARS
Attorney for Appellant
1822 - 11th Street, N. W.
Washington, D. C.

Subscribed and sworn to before me this day of October, 1964.

.....

Notary Public

My commission expires:

[Certificate of Service]